CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 490

BUS AND TRANSPORT SECURITIES CORPORATION,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 3, 1935.

CERTIORARI GRANTED NOVEMBER 11, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 490

BUS AND TRANSPORT SECURITIES CORPORATION, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1935.

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 63791

BUS AND TRANSPORT SECURITIES CORPORATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

APPEARANCES:

For Taxpayer: George R. Beneman, Esq., A. E. James, Esq.

For Comm'r: C. H. Curl, Esq., Hugh Brewster, Esq.

DOCKET ENTRIES

1932.

Apr. 2. Petition received and filed. Taxpayer notified. (Fee paid).

Apr. 4. Copy of petition served on General Counsel.

May 19. Answer filed by General Counsel.

June 18. Copy of answer served on taxpayer. General Calendar.

Nov. 8. Hearing set Dec. 13, 1932.

Nov. 21. Amended answer filed by General Counsel. Copy served 12/1/32.

Dec. 13. Hearing had before H. F. Seawell, Div. 4. Submitted on record. Briefs due in 60 days.

[fol. 2]

Dec. 21. Transcript of hearing of Dec. 13, 1932, filed.

1933.

Jan. 28. Brief filed by taxpayer:

Feb. 10. Brief filed by General Counsel.

June 15. Memorandum opinion rendered, H. F. Seawell, Div. 4. Judgment will be entered for respondent.

June 16. Decision entered, H. F. Seawell, Div. 4.

Sept. 13. Petition for review by U. S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer.

Sept. 13. Proof of service filed by taxpayer.

Oct. 18. Præcipe for record with proof of service thereon filed.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed April 2, 1932

The above-named taxpayer hereby petitions for a redetermination of the deficiency determined by the Commissioner, as set forth in his deficiency letter dated February 24, 1932, IT:AR:B-4-WR-60D, and as a basis for this proceeding sets forth the following:

I. Petitioner is a corporation organized under the laws of the State of New Jersey, with its principal place of business at 111 North Mountain Avenue, Montclair, New Jersey.

II. The notice of deficiency purports to have been mailed to petitioner on February 24, 1932; a copy of the said notice is attached hereto, marked "A", and made a part hereof.

III. The taxes in controversy are corporate income taxes for the calendar year 1929. The amount in controversy is the deficiency of $27,011.88.

[fol. 4] IV. The determination of the Commissioner is erroneous in that: In the audit of the petitioner's return for the said year 1929, the Commissioner has asserted that petitioner realized a taxable gain from an exchange of securities, as more fully hereinafter set forth.

V. The facts upon which petitioner relies in support of this proceeding are as follows:

(a) Prior to the transactions as hereinbelow set forth, C. Easman Jacobus, was the owner of practically all of the stock of two corporations—the Butler-Newark Bus Line, Inc. and the Boonton-Mt. Lakes-Newark Bus Lines, Inc. The stocks had cost C. Easman Jacobus $28,500.

(b) The Public Service Corporation of New Jersey, a corporation engaged in the rendering of public utilities services in the said State, desired to acquire the said two bus lines, and negotiated with the said C. Easman Jacobus. A plan for the said acquisition, hereinafter outlined, was devised and executed.

(c) The Public Service Coordinated Transport, a corporation affiliated with the said Public Service Corporation of New Jersey, caused to be organized under the laws of the State of New Jersey, the C. Easman Jacobus, Inc., a corporation, and in pursuance of the plan transferred to the said corporation in exchange for all of its capital stock 2500 shares, 6 per cent. cumulative preferred stock of the Public Service Corporation of New Jersey.

(d) C. Easman Jacobus personally caused to be organized the petitioner corporation, the Bus and Transport Securities Corporation, and caused petitioner to issue to him and his nominees all of its capital stock in the amount of 2000 [fol. 5] shares in exchange for all of the capital stock then issued and outstanding of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all in pursuance of the said plan.

(e) Thereupon the Public Service Coordinated Transport Company in pursuance of the said plan transferred to petitioner all the said capital stock of C. Easman Jacobus Inc., and petitioner transferred to the said Public Service Coordinated Transport Company all the said capital stocks of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all on March 29, 1929.

(f) The fair market value of the said stock of the said C. Easman Jacobus, Inc., at the time acquired by petitioner, in the said year 1929 was $274,062.50.

(g) Petitioner filed its return for the said year 1929 at or about the due date thereof and included therein no computation of gain or loss on any transaction or transactions as herein above set forth. The Commissioner audited the said return, determined that petitioner had realized a gain of $245,562.50 in the acquisition of the capital stock of C. Easman Jacobus, Inc. in the manner hereinabove stated, and as a result thereof determined the deficiency of $27,011.88, as hereinabove appealed from.

VI. Wherefore, petitioner prays that the Board order, determine and adjudge that no taxable profit was realized by it from the transactions above outlined or any of them, and that there is no deficiency due from petitioner for the

said year 1929, and grant such other and further relief as may be just.

Bus and Transport Securities Corp., By C. Easman Jacobus, President.

[fol. 6] *Duly sworn to by C. Easman Jacobus. Jurat omitted in printing.*

EXHIBIT "A" TO PETITION

(Copy)

Treasury Department

Washington

Feb. 24, 1932.

Bus and Transport Securities Corporation,
c/o C. Easman Jacobus,
111 North Mountain Avenue,
Montclair, New Jersey.

SIRS:

You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $27,011.88, as shown in the statement attached.

[fol. 7] In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, inter-

est will accumulate to the date of assessment of the deficiency.

Respectfully, David Burnet, Commissioner. By J. C. Wilmer, Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

[fol. 8] Statement

IT:AR:B-4
WR-60D

In re: Bus and Transport Securities Corporation, c/o C. Easman Jacobus, 111 North Mountain Avenue, Montclair, New Jersey.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$27,011.88	None	$27,011.88

In the determination of your tax liability careful consideration was given your protest dated September 19, 1921 in connection with the findings set forth in the revenue agent's report dated June 23, 1931, and the additional evidence submitted at a conference held in this office under date of February 8, 1932.

Net income disclosed by the return	None
Add:	
Taxable income:	
Profit on exchange of assets	$245,562.50

The exchange of stock resulting in the above amount of profit represented the assets, or property, of the exchanging corporations, and inasmuch as it appears that gain or loss must be recognized in a transaction of this nature under the provisions of section 112 of the Revenue Act of 1928, the computation of gain as set forth in the revenue agent's report has been approved.

The profit on exchange of assets for assets is computed as follows:

[fol. 9] Received 2,500 shares Public Service Corporation of New York market value date of exchange $109.625	$274,062.50
Cost of stock exchanged	28,500.00
Taxable profit	$245,562.50

Computation of Tax.

Net income subject to tax	$245,562.50
Income tax at 11%	27,011.88

BEFORE U. S. BOARD OF TAX APPEALS

ANSWER—Filed May 19, 1932

Now comes the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

I, II, III. Admits the allegations contained in paragraphs I, II and III.

IV. Denies the errors alleged in paragraph IV of the petition.

V (a) to (g) inclusive. Denies each and every allegation of fact contained in paragraph V of the petition which is contrary to or inconsistent with the determination of the Commissioner as set forth in the deficiency notice.

Denies that petitioner is entitled to any of the relief prayed for.

[fol. 10] Wherefore, it is prayed that the appeal be denied and the tax as shown in the deficiency notice be in all respects approved.

(Sgd.) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: C. H. Curl, Hugh Brewster, Special Attorneys, Bureau of Internal Revenue.

[fol. 11] BEFORE U. S. BOARD OF TAX APPEALS

AMENDED ANSWER—Filed November 21, 1932

Now comes the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and with the consent of the Board of Tax Appeals, files this, his amended answer.

I, II, III. Admits the allegations as set forth in paragraphs I, II and III of the petition.

IV. The respondent denies that he committed an error in the audit of the petitioner's return for the year 1929 and denies each and every allegation of error contained in the petition.

V. The respondent admits the allegations of fact as set forth in the petition under paragraph 5 (a) to (g) inclusive.

VI. The respondent denies that the petitioner is entitled to any of the relief prayed for in its petition.

Wherefore, it is prayed that the appeal be denied and the tax as shown in the deficiency notice be in all respects approved.

(Sgd.) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: C. H. Curl, Special Attorney, Bureau of Internal Revenue.

[fol. 12] BEFORE U. S. BOARD OF TAX APPEALS

MEMORANDUM OPINION—Entered June 15, 1933

SEAWELL:

The respondent determined petitioner's liability for corporate income tax for the year 1929 to be $27,011.88, which whole amount is in controversy.

The question presented in this proceeding is whether the petitioner realized a taxable gain from the exchange of certain stock which it owned for the entire capital stock of C. Easman Jacobus, Incorporated.

The facts are virtually stipulated, the material allegations of fact asserted in the petition being admitted in the amended answer, as follows:

The petitioner is a corporation organized under the laws of the State of New Jersey, with its principal place of business in Montclair, New Jersey.

Prior to the transactions as hereinbelow set forth, C. Easman Jacobus was the owner of practically all of the stock of two corporations—the Butler-Newark Bus Line, Inc., and the Boonton-Mt. Lakes-Newark Bus Lines, Inc. The stocks had cost C. Easman Jacobus $28,500.

The Public Service Corporation of New Jersey, a corporation engaged in the rendering of public utilities services in the said state, desired to acquire the said two bus lines, and negotiated with the said C. Easman Jacobus. A plan for the said acquisition, hereinafter outlined, was devised and executed.

The Public Service Coordinated Transport, a corporation affiliated with the said Public Service Corporation of New Jersey, caused to be organized under the laws of the State of New Jersey, the C. Easman Jacobus, Inc., a corporation, and in pursuance of the plan transferred to the said corpo- [fol. 13] ration in exchange for all of its capital stock 2,500 shares, 6 per cent. Cumulative Preferred Stock of the Public Service Corporation of New Jersey.

C. Easman Jacobus personally caused to be organized the petitioner corporation, the Bus and Transport Securities Corporation, and caused petitioner to issue to him and his nominees all of its capital stock in the amount of 2,000 shares in exchange for all of the capital stock then issued and outstanding of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all in pursuance of the said plan.

Thereupon the Public Service Coordinated Transport Company in pursuance of the said plan transferred to petitioner all the said capital stock of C. Easman Jacobus, Inc., and petitioner transferred to the said Public Service Coordinated Transport Company all the said capital stocks of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all on March 29, 1929.

The fair market value of the said stock of the said C. Easman Jacobus, Inc., at the time acquired by petitioner in the said year 1929 was $274,062.50.

The petitioner filed its return for the said year 1929 at or about the due date thereof and included therein no computation of gain or loss on any transaction or transactions as herein above set forth. The Commissioner audited the said return, determined that petitioner had realized a gain of $245,562.50 in the acquisition of the capital stock of C. Easman Jacobus, Inc., in the manner hereinabove stated, and as a result thereof determined the deficiency of $27,011.88, as hereinabove appealed from.

The law applicable to the issue here involved is found in the Revenue Act of 1928, the particular provisions being sections 111, 112 and 113.

[fol. 14] The petitioner contends that the transaction in question, as established by the facts is one falling within the provisions of section 112, dealing with the recognition of gain and loss and is covered by section 112 (b) (4) as further defined in section 112 (i).

The respondent, on the contrary, insists that the aforesaid transaction did not result in a reorganization, merger or consolidation and does not bring the case within any of the exceptions provided in section 112 (b) of the Revenue Act of 1928.

The numerous corporations and exchanges of stock between them shown by the facts tend to somewhat obscure the real issue, which is simply what was the transaction and the result therefrom in respect to gain or loss experienced by the petitioner when it exchanged with the Public Service Coordinated Transport Company property, in the form of capital stock of other corporations, costing it $28,500 for capital stock of another and different corporation owned by said Public Service Coordinated Transport Company (but not its own capital stock) and of the fair market value of $274,062.50 at the date of said exchange in 1929.

The record does not indicate that either the petitioner or the Public Service Coordinated Transport Company owned any of the capital stock of the other or that any of the stockholders of the one owned any capital stock of the other. It was purely a matter of exchanging property

consisting of stock of other corporations distinct from either of the parties to the transactions.

After the transaction, the two parties to it were (so far as shown by the record) separate and distinct operating companies, the owners of whose capital stock were not the same parties.

In Pinellas Ice & Cold Storage Co. v. Commissioner, 57 Fed. (2d) 188, which was affirmed by the United States Su- [fol. 15] preme Court January 9, 1933, 287 U. S. 462, the Court of Appeals, after quoting from section 203 (h) (i) of the 1926 Revenue Act (which is the same as section 112 (i) (1) of the 1928 Revenue Act) relative to the meaning of the term "reorganization," said:

> As applied to corporations the terms "merger" and "consolidation" have well known legal meanings. While the result is practically the same in either event, there is this difference. In a merger one corporation absorbs the other and remains in existence while the other is dissolved. In a consolidation a new corporation is created and the consolidating corporations are extinguished. In either event the resulting corporation acquires all the property, rights and franchises of the dissolved corporations and their stockholders become its stockholders. Royal Palm Soap Co. v. Seaboard Air Line Ry. Co., 296 Fed. 448; Bauvier's Law Dictionary (3rd Ed.) p. 2202, verbo "merger."

The transaction clearly was not a merger nor was it a consolidation; neither corporation was dissolved and no new corporation came into being. See Minnesota Tea Co., 28 B. T. A. —, for a complete discussion of the applicable law.

The petitioner may have intended to effect a reorganization and fall within the exceptions under section 112 of the 1928 Revenue Act, but we must determine the question upon what was actually done and not upon what may have been the design and purpose of the parties to the transactions. United States v. Phellis, 257 U. S. 156, 172; Weiss v. Stern, 265 U. S. 242.

Counsel for the petitioner cites Tulsa Oxygen Co., 18 B. T. A. 1283, as furnishing a very close parallel in the application of the principle relied on by petitioner in the instant case. The section of the law involved and con-

[fol. 16] strued in that case is not the same as the one relied on in the instant case and a careful consideration of the facts in the two cases shows they are not in all material respects the same. In the circumstances of the instant case, our determination in Tulsa Oxygn Co., supra, is not controlling.

In our opinion, the term "reorganization" as defined by section 112 (i) (1), supra, excludes both parties to the transaction in issue for it is not shown that either acquired a majority of the stock of the other or "substantially all the properties" of the other, and such being the case, the transaction in question fails to come within any of the exceptions under section 112 (b), supra, and under subdivision (a) of that section the difference between the $28,500 aforesaid and the $274,062.50, or $245,562.50 is taxable gain to the petitioner as asserted by the respondent and we so determine.

Judgment will be entered for the respondent.

BEFORE U. S. BOARD OF TAX APPEALS

DECISION—Entered June 16, 1933

Pursuant to the determination of the Board as set forth in its memorandum opinion entered June 15, 1933, it is

Ordered and decided: That there is a deficiency of $27,011.88 for the year 1929.

(Sgd.) H. F. Seawell, Member.

[fol. 17] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REVIEW OF DECISION BY THE UNITED STATES BOARD OF TAX APPEALS—Filed September 13, 1933

Now comes the petitioner, the Bus and Transport Securities Corporation, by its attorneys, George R. Beneman and A. E. James, and respectfully shows:

I. That this is a proceeding for review by the United States Circuit Court of Appeals for the Third Circuit of a decision of the United States Board of Tax Appeals entered on June 16, 1933, Docket No. 63791, redetermining deficiency in income taxes of petitioner for the calendar year 1929, in the amount of $27,011.88.

II. That your petitioner is a corporation organized under the laws of the State of New Jersey, having its principal place of business at 111 North Mountain Avenue, Montclair, New Jersey, and that its income tax return for the calendar year 1929 was filed with the Collector of Internal Revenue for the Fifth District of New Jersey, at Newark, N. J.

[fol. 18] III. That the nature of the controversy is as follows, to wit:

Whether or not the transfer of certain stock owned by petitioner to The Public Service Coordinated Transport Co. in return for which The Public Service Coordinated Transport Co. transferred to petitioner the entire capital stock of C. Easman Jacobus, Inc., resulted in a taxable gain within the meaning of the Revenue Act of 1928.

IV. That the case was submitted to the Board of Tax Appeals on petition, answer and amended answer, and that after due hearing thereon there was entered on June 16, 1933, an order of the Board determining a deficiency in the amount of $27,011.88.

V. That petitioner, being aggrieved by the conclusion of the Board of Tax Appeals that the transaction involving certain stock transfers was not a "reorganization" within the meaning of Section 112 (b), and that the exchange of stock resulted in a taxable gain, hereby petitions for a review of the decision of said Board by the United States Circuit Court of Appeals for the Third Circuit.

VI. That the petitioner's assignments of error are as follows:

(1) The Board of Tax Appeals erred in failing to make a literal application of the plain language of Section 112 (b) (4).

(2) The Board of Tax Appeals erred in holding that the exchange of stock between the Public Service Coordinated Transport Co. and the Bus and Transport Securities Corporation did not amount to a reorganization within the meaning of Section 112 (i) (1).

[fol. 19] (3) The Board of Tax Appeals erred in ordering that a judgment be entered for respondent and in failing to order the entry of a judgment for petitioner.

Bus and Transport Securities Corporation, By Geo. R. Beneman, A. E. James, Attorneys for Petitioner.

Duly sworn to by A. E. James. Jurat omitted in printing.

[fol. 20] BEFORE U. S. BOARD OF TAX APPEALS

PROOF OF SERVICE—Filed September 13, 1933

Honorable E. Barrett Prettyman,
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.

Re: Bus and Transport Securities Corporation, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 63791

SIR:

You are hereby notified that the petitioner in the above-entitled proceeding has on this thirteenth day of September, 1933, filed with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the said Board of Tax Appeals in the above-entitled matter. A copy of the petition for review and assignment of errors as filed are attached hereto.

Geo. R. Beneman, A. E. James, Attorneys for Petitioner.

Service of copy of above notice acknowledged this thirteenth day of September, 1933.

E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, Attorney for Commissioner of Internal Revenue.

[fol. 21] BEFORE U. S. BOARD OF TAX APPEALS

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed October 18, 1933

To the Clerk of the United States Board of Tax Appeals, Washington, D. C.:

SIR:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, Philadelphia, Pennsylvania, pursuant to the review taken in the above-entitled case and to include in such transcript of record copies duly certified as correct of the following documents:

(1) The docket entries of proceedings before the Board.

(2) Pleadings before the Board.

(a) Petition.

(b) Answer to petition.

(c) Amended answer.

(3) Memorandum opinion and decision of the Board including final order of redetermination.

(4) Petition for review, notice of filing petition for review and admission of service of copies thereof.

(5) This præcipe.

Respectfully, A. E. James, Geo. R. Beneman, Attorneys for Petitioner.

Service of a copy accepted October —, 1933.
E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

[fol. 22] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 23] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5308

BUS & TRANSPORT SECURITIES CORP., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER ASSIGNING JUDGES—Filed April 4, 1934

Appeal from the U. S. Board of Tax Appeals

And now, to wit: This fourth day of April A. D. 1934, it is ordered that Hon. Albert W. Johnson, District Judge for the Middle District of Pennsylvania, and Hon. William Clark, District Judge for the District of New Jersey, be, and they are hereby assigned to sit in above case in order to make a full court.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 24] Minute entry of argument and submission, April 4, 1934, omitted in printing.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5308

BUS AND TRANSPORT SECURITIES CORPORATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition for Review from the United States Board of Tax Appeals

Before Davis, Circuit Judge, and Johnson and Clark, District Judges.

OPINION.—Filed July 3, 1935.

CLARK, District Judge.

A taxing statute is drawn. Certain of its provisions work an injustice. They are modified. The modifications

are scrutinized, not in the spirit of their enactment, but according to the letter of their language. Procedure designed to fit that letter is devised. The courts are asked to appraise that devising (cf. our own opinion of two years ago, Geo. H. Clapp v. D. B. Heiner, Collector of Internal Revenue, 51 F. (2d) 224).

[fol. 26] An economy based on money might have eliminated the once universal practice of barter. That seems to have been the assumption of the draftsmen of the original (1916) income tax act. Its omission was repaired by section 202b of the 1918 act, whereby gain or loss from exchanges was included in express terms. The principal opinion does not require us to follow in any detail the subsequent improvement of the first provision. The history of the legislation is set forth in some detail in opinions filed in the Fourth and Second Circuits. C. H. Mead Coal Co. v. Commissioner of Internal Revenue, 72 F. (2d) 22; John J. Watts v. Commissioner of Internal Revenue, 75 F. (2d) 981. Curiously counsel did not cite us to a recent book devoted entirely to this rather narrow subject. (Reorganization and Other Exchanges in Federal Income Taxation, by Miller, Hendricks and Everett.) The struggle of the Congress to be fair with the taxpayer is made abundantly clear therein.

The statute in the form with which we are presently concerned is found in section 2112, Title 26, U. S. C. A. and reads:

"Recognition of Gain or Loss

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 2111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges solely in kind.—

(4) —Gain of Corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(i) Definition of reorganization.—As used in this section and sections 2113 and 2115—

[fol. 27] (1) The term 'Reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and

at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place or organization, however effected.

(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

The real party in interest in the case at bar is one C. Easman Jacobus. Prior to 1929 he was engaged in the transport bus business in Morris County, New Jersey. The citizens of that State will remember that about that time the Public Service Corporation realized that the advance of the motor vehicle art was making serious inroads upon its transportation by trolley. The highways and streets of the State were crowded with buses, all competing with the street cars of the Public Service. It became anxious to extend its trolley transport monopoly to gasoline propelled trackless vehicles, i. e., buses. These buses were generally owned in small units. One individual, either personally or through the corporate device, owned and operated a small fleet of buses on limited routes.

[fol. 28] In order to acquire this particular bus line, the Public Service Coordinated Transport Company was willing to afford Mr. Jacobus a handsome profit, namely, a quarter of a million dollars. To the lay mind this would seem to be easily "recognizable" as a gain. But then those without benefit of legal education would not "recognize" the possibilities of the "corporate reorganization" provisions of the Revenue Act. The case at bar arises out of such recognition by Mr. Jacobus' advisor or advisors. It fails in this court at least, because we happen to share the lay, rather than the legalistic, point of view.

Mr. Jacobus could have transferred the stock in his bus company to the Public Service Coordinated Transport Company for cash; he could have transferred it for some

form of obligation issued from that corporation, i. e., preferred stock, notes, bonds, et cetera. But then the fact of gain could not have been denied. So instead, each party to the sale created a new corporation and transferred the respective considerations, i. e., bus company stock and the preferred stock to the treasury of the two new corporations. Then the sellers corporation acquired all the stock in the buyers corporation. The memorandum filed by the Board of Tax Appeals indicates that it considered the transaction outside the technical terms of the statute. That is a solution. We prefer a more fundamental one.

It is our opinion that the provision of the Revenue Act invoked here is in no way applicable. The section is entitled, "The gain of a corporation." We are not dealing with the gain of any corporation. The gain is that of C. E. Jacobus and his alone. If he is to be allowed to disguise that gain by the creation of corporations, any attempt to tax gain is rendered nugatory. Obviously, any seller and any buyer can proceed exactly as the buyer and [fol. 29] seller did in this case. So for the payment of a small franchise tax and perhaps equally small legal fees, the gain becomes not a "gain" but a "reorganization." To so declare would make impossible taxation of receipts from appreciation of assets.

The Board of Tax Appeals is affirmed.

A true Copy: Teste:

—— ——, Clerk of the United States Circuit Court Court of Appeals for the Third Circuit.

[fol. 30] In United States Circuit Court of Appeals for the Third Circuit, March Term, 1934

No. 5308

Bus and Transport Securities Corporation, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Judgment—Filed July 3, 1935

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby affirmed.

Philadelphia, July 3, 1935.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 31] Clerk's Certificate to the foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 11, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is assigned for argument immediately following No. 187.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 490

BUS AND TRANSPORT SECURITIES CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALBERT E. JAMES,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 490

BUS AND TRANSPORT SECURITIES CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petition.

Bus and Transport Securities Corporation, by its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above cause July 3, 1935 (R. 18) as cause No. 5308 in the said court. Said decision of the United States Circuit Court of Appeals for the Third Circuit affirmed a memorandum opinion and decision of the United States Board of Tax Appeals at Docket No. 63791.

Statement.

The question presented in the said cause is:

Whether the petitioner realized a taxable gain within the meaning of the Revenue Act 1928 by a transaction in which it received the entire capital stock of a corporation in exchange for all of its assets.

The Board of Tax Appeals held that a taxable gain was realized in the year 1929 by reason of the foregoing transaction. The Circuit Court of Appeals for the Third Circuit sustained the decision of the Board of Tax Appeals.

Specification of Errors.

(1) The Circuit Court of Appeals erred in holding that the exchange of property for stock above referred to between the Public Service Coordinated Transport and the Bus and Transport Securities Corporation, this petitioner, was not a reorganization within the meaning of Sections 112 (b) (4) and 112 (i) (1) and 112 (i) (2) of the Revenue Act of 1928.

(2) The Circuit Court of Appeals erred in holding and deciding that the petitioner received a taxable gain by reason of the exchange of its assets for all the capital stock of C. Easman Jacobus. That corporation in turn had as its sole asset shares of the Public Service Corporation of New Jersey which in turn was affiliated with and controlled the Public Service Coordinated Transport, the corporation to which the petitioner transferred its assets and from which it received such stock of C. Easman Jacobus, Inc.

(3) The Circuit Court of Appeals erred in affirming the judgment theretofore entered for the respondent, Commissioner of Internal Revenue, and erred in failing to reverse

said judgment and in failing to direct the entry of an order reversing the said judgment.

(4) The Circuit Court of Appeals erred in affirming the deficiency in tax asserted by the Commissioner of Internal Revenue and in approving the order of the Board redetermining that deficiency.

Reasons for Granting the Writ.

(1) The decision of the Circuit Court of Appeals for the Third Circuit in this case is deemed to be in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Minnesota Tea Company* v. *Commissioner*, 76 F. (2d) 797.

(2) Said decision of the Circuit Court of Appeals for the Third Circuit in this cause involves an important question of Federal law which should be settled by this Court. The issue of law in this proceeding involves the construction of the so-called reorganization provisions contained in the several Revenue Acts from 1924 to 1934 inclusive. It is of general interest and great importance both for future guidance and for the construction of prior acts.

(3) Said decision of the Circuit Court of Appeals for the Third Circuit in this cause is probably in conflict with an applicable decision of this Court, *Pinellas Ice and Cold Storage Co.* v. *Commissioner*, 287 U. S. 462.

WHEREFORE it is respectfully submitted that this petition should be granted and writ of certiorari issued accordingly.

ALBERT E. JAMES,
Counsel for the Petitioner.

BRIEF IN SUPPORT OF THE PETITION.

The Findings of Fact and Opinion of the Board of Tax Appeals are unreported except in the record (pp. 7-11). The opinion of the Circuit Court of Appeals (R. 15) is not yet reported.

Jurisdiction.

The decision and order of the Circuit Court of Appeals for the Third Circuit were entered July 3, 1935. Jurisdiction is conferred upon this Court by Section 1003 of the Revenue Act of 1926, c. 27, Section 1003, 44 Stat. 1010, U. S. C. A., Title 26, Sec. 1226.

Question Presented.

The question presented is:

Whether the transfer by a corporation of its assets, consisting of stocks of bus transportation companies, to another corporation in exchange for all the capital stock of a corporation which in turn owned shares of the transportation corporation intending to continue and carry on the business of the said bus companies, constituted a reorganization within the meaning of Sections 112(b)(4) and 112 (i) (1) and 112 (i) (2) of the Revenue Act of 1928.

Statutes.

The statutory provisions pertinent to the above question are all contained in Section 112 of the Revenue Act of 1928 and are as follows:

"SEC. 112. *Recognition of Gain or Loss.*

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under Section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges solely in kind.—

(4) Same—Gain of Corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(i) Definition of reorganization.—As used in this section and Sections 113 and 115—

(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

Statement of Facts.

The facts are simple and are fully stated in the pleadings (R. 2-3, 7) and in the memorandum opinion of the Board (R. 8-9). They are as follows:

Prior to the transactions as hereinbelow set forth, C. Easman Jacobus was the owner of practically all of the stock of two corporations—The Butler-Newark Bus Line,

Inc., and the Boonton-Mt. Lakes-Newark Bus Lines, Inc. The stocks had cost C. Easman Jacobus $28,500.

The Public Service Corporation of New Jersey, a corporation engaged in the rendering of public utilities services in the said State, desired to acquire the said two bus lines, and negotiated with the said C. Easman Jacobus. A plan for the said acquisition, hereinafter outlined, was devised and executed.

The Public Service Coordinated Transport, a corporation affiliated with the said Public Service Corporation of New Jersey, caused to be organized, under the laws of the State of New Jersey, the C. Easman Jacobus, Inc., a corporation, and in pursuance of the plan transferred to the said corporation in exchange for all of its capital stock 2,500 shares 6 per cent cumulative preferred stock of the Public Service Corporation of New Jersey.

C. Easman Jacobus personally caused to be organized the petitioner corporation, the Bus and Transport Securities Corporation, and caused petitioner to issue to him and his nominees all of its capital stock in the amount of 2,000 shares in exchange for all of the capital stock then issued and outstanding of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all in pursuance of the said plan.

Thereupon the Public Service Coordinated Transport Company, in pursuance of the said plan, transferred to petitioner all the said capital stock of C. Easman Jacobus, Inc., and petitioner transferred to the said Public Service Coordinated Transport Company all the said capital stocks of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all on March 29, 1929.

The fair market value of the said stock of the said C. Easman Jacobus, Inc., at the time acquired by petitioner in the said year 1929 was $274,062.50.

Petitioner filed its return for the said year 1929 at or about the due date thereof and included therein no computation of gain or loss on any transaction or transactions as hereinabove set forth. The Commissioner audited the said return, determined that petitioner had realized a gain of $245,562.50 in the acquisition of the capital stock of C. Easman Jacobus, Inc., in the manner hereinabove stated, and as a result thereof determined the deficiency of $27,011.88, as hereinabove appealed from.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals for the Third Circuit in this case is deemed to be in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Minnesota Tea Company v. Commissioner, 76 F. (2d) 797.

Briefly stated, the facts in this case are that the Public Service Corporation of New Jersey desired to acquire the capital stock of two operating bus line corporations in New Jersey from the owner of that stock, C. Easman Jacobus. Payment was to be made in capital stock of the Public Service Corporation of New Jersey. The Public Service Corporation of New Jersey caused its subsidiary, Public Service Coordinated Transport, to organize a corporation, C. Easman Jacobus, Inc., and transferred to that corporation twenty-five hundred shares of the preferred stock of the Public Service Corporation of New Jersey.

Mr. Jacobus organized the petitioner and transferred to it the capital stocks of the two operating bus companies.

The petitioner transferred the capital stock of the operating bus companies, which he owned, to the Public Service Coordinated Transport and received in exchange the capital stock of C. Easman Jacobus, Inc. This transaction the

Circuit Court of Appeals held resulted in taxable gain to the petitioner.

The net result of the transaction was that Jacobus, as an individual and owner of two operating bus lines, became indirectly, through his ownership of the capital stock of the petitioner, a stockholder in the Public Service Corporation of New Jersey which, through its subsidiary, acquired said bus lines and continued to operate them. Thus, viewed as an individual transaction, Jacobus continued to have a stake in the business in which he had previously engaged. In *Minnesota Tea Co.* v. *Commissioner*, 76 F. (2d) 797, the Circuit Court of Appeals for the Eighth Circuit reversed the United States Board of Tax Appeals in a similar but not so strong a case for the petitioner and held that taxable gain was not realized from a transaction of this character. In the *Minnesota Tea Co.* case the corporation, then engaged in business, transferred its principal assets to the Grand Union Co. in exchange for a mixed aggregate of cash and stock, which cash was distributed to the stockholders of the Minnesota Tea Co. who paid that corporation's debts and the Minnesota Tea Co. continued to hold the Grand Union Company's stock. Under these circumstances the Board of Tax Appeals held in that case as in the present case that a taxable gain was realized where the seller received the capital stock of the purchasing corporation (28 B. T. A. 591). The Eighth Circuit reversed the Board. The Third Circuit in this case affirmed. Except for the fact that cash also passed in the *Minnesota Tea Co.* case, the facts involved and the principles of law applicable are identical. There is a clear and unmistakable conflict between the decisions of the two circuits.

No attempt will be made in this brief in support of the application for the issuance of the writ of certiorari to argue the correctness as a matter of law of the petitioner's position in this case. That argument belongs more properly

in the brief on the merits, if this petition for the writ is granted.

II.

Said decision of the Circuit Court of Appeals for the Third Circuit in this cause involves an important question of Federal law which should be settled by this Court.

The question presented is difficult and the statutory provisions involved have received attention from this Court in only two decided cases—*Pinellas Ice and Cold Storage Co.* v. *Commissioner*, 287 U. S. 642; *Gregory* v. *Helvering*, 293 U. S. 465, 55 Sup. Ct. Rep. 206. Neither of these cases involved the type of case to which the so-called reorganization provisions apply, that is cases involving transfers to or by corporations wherein the transferring party continues to have a stake in the continued business enterprises. Both the *Pinellas* and the *Gregory* cases involved, in the final analysis, the sale of property for cash, and this Court, looking through the corporate transactions to the real essence of the thing done, held that the transactions fell without the scope of the reorganization provisions.

Section 112 of the Revenue Act of 1928 has its counterpart in Sections 203 of the Revenue Acts of 1924 and 1926 and Sections 112 of the Revenue Acts of 1932 and 1934. For the greater portion of this period these provisions have been copied verbatim from one Revenue Act to the next. Over this period of more than ten years, with essentially the same laws in force, innumerable transactions have occurred in which taxpayers have endeavored to fit the transaction within the statutory provisions, not so much with a view to avoiding taxation, but with the view of achieving certainty in the resulting taxation. A very substantial number of cases have been heard by the Board of Tax Appeals, a very much larger number remain to be heard. A number of such cases have been decided in the various cir-

cuits. Conflicts are beginning to arise, perhaps the clearest conflict being that between this case and *Minnesota Tea Company* v. *Commissioner, supra.* It is very important, both for the guidance of taxpayers in the consummation of future business transactions and for the orderly construction of the Revenue Acts, that the application of these reorganization provisions (so called) to significant states of fact be clarified by this Court.

III.

Said decision of the Circuit Court of Appeals for the Third Circuit in this cause is probably in conflict with an applicable decision of this Court, Pinellas Ice and Cold Storage Co. v. Commissioner, 287 U. S. 462.

Pinellas Ice and Cold Storage Co. v. *Commissioner,* 287 U. S. 462, was the first case considered by this Court involving the construction of the statutory provision here under consideration. The decision of the Circuit Court for the Fifth Circuit was in conflict with the construction given in the administration of the section in the Bureau of Internal Revenue, and the Department of Justice, in the brief for the Government in that case, asked this Court to clarify the parenthetical clause in what is Section 112(i) 1 of the Act involved in this case. Responding to that request, this Court (287 U. S. 469-70) said:

> "The court below held that the facts disclosed failed to show a 'reorganization' within the statutory definition. And, in the circumstances, we approve that conclusion. But the construction which the court seems to have placed upon clause A, paragraph (h)(1), section 203 (26 U. S. C. A., Sec. 934(h)(1), cls. (A, B), we think is too narrow. It conflicts with established practice of the tax officers and, if passed without comment, may produce perplexity.

"The court said: 'It must be assumed that in adopting paragraph (h) Congress intended to use the words "merger" and "consolidation" in their ordinary and accepted meanings. Giving the matter in parentheses the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger of consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point.'

"The paragraph in question directs: 'The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation).' The words within the parentheses may not be disregarded. They expand the meaning of 'merger' or 'consolidation' so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness can not be designated as either merger or consolidation. But the mere purchase for money of the assets of one company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes. This general view is adopted and well sustained in *Cortland Specialty Co.* v. *Commissioner of Internal Revenue* (C. C. A.) 60 Fed. (2d) 937, 939, 940. It harmonizes with the underlying purpose of the provisions in respect of exemptions and gives some effect to all the words employed."

The words in the parentheses as set forth in the statute

> "(including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation.)"

covers the exact transaction involved in the instant case.

This Court is now asked to grant this writ of certiorari so that it may "delimit" to a further extent the applicability of this parenthetical clause to a transfer, out of which the transferor does "acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes." The Court is asked to grant this writ to determine if a "reorganization" occurs in and embraces and includes cases in which the "seller" continues his stake "in the affairs of the purchasing company" by becoming the owner of capital stock in that company and acquiring nothing else on the exchange.

Conclusion.

It is perhaps helpful to read parenthetically into the statutory provisions the exact steps which bring the transaction involved in this case literally within the provisions of Section 112(b)(4) and Section 112 (i) of the Revenue Act of 1928. As so interpolated, Section 112(b)(4) reads as follows:

> "No gain or loss shall be recognized if a corporation"—Bus and Transport Securities Corporation—"a party to a reorganization exchanges property"—the capital stock of Butler-Newark Bus Line, Inc., and Boonton-Mt. Lakes Bus Lines, Inc.—"in pursuance of the plan of reorganization, solely for stock or securities in another corporation"—C. Easman Jacobus, Inc.—"a party to the reorganization."

Pursuing the same interpolation, the transaction falls within the definition of a plan of reorganization as follows:

> (Section 112(i)(1)). "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation"—Bus and Transport Securities Corporation—"of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation"—C. Easman Jacobus, Inc.—)

Further pursuing the above, the interpolation in Section 112(i)(2) is as follows:

> "The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation"—Bus and Transport Securities Corporation—"of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation"—C. Easman Jacobus, Inc.—

Literally the petitioner in this proceeding is within the terms of the statute. The transaction fits exactly into the statutory language; since it does so, it is entitled to have that language applied in accordance with its literal meaning and obvious intent.

Crooks v. *Harrelson*, 282 U. S. 55.

Respectfully submitted,

ALBERT E. JAMES,
Attorney for the Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 490

BUS AND TRANSPORT SECURITIES CORPORATION,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

ALBERT E. JAMES,
Attorney for the Petitioner.

Eynon Printing Co., Inc., Washington, D. C.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals is unreported except in the Record (pages 7-11). The opinion of the Circuit Court of Appeals (R. 15) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Third Circuit was entered July 3, 1935 (R. 19) (R. 15-18). A petition for a writ of certiorari was filed October 3, 1935 and was granted November 11, 1935. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code as Amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is:

Whether the transfer by a corporation of its assets, consisting of stocks of bus transportation companies, to another corporation in exchange for all the capital stock of a corporation which in turn owned shares of the transportation corporation intending to continue and carry on the business of the said bus companies, constituted a reorganization within the meaning of Sections 112(b) (4) and 112(i) (1) and 112(i) (2) of the Revenue Act of 1928.

STATUTES

The statutory provisions pertinent to the above question are all contained in Section 112 of the Revenue Act of 1928 and are as follows:

"Sec. 112. Recognition of Gain or Loss.

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under Section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges solely in kind.

(3) Stock For Stock On Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such

corporation or in another corporation a party to the reorganization.

(4) Same—Gain of Corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(i) Definition of reorganization.—As used in this section and Sections 113 and 115—

(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

STATEMENT OF FACTS

The facts as found by the Board of Tax Appeals which consisted of allegations in the petition admitted by the respondent's answer are as follows (R. 2-3, 7, 8, 9):

Prior to the transactions as hereinbelow set forth, C. Easman Jacobus was the owner of practically all of the stock of two corporations—The Butler-Newark Bus Line, Inc., and the Boonton-Mt. Lakes-Newark Bus Lines, Inc. The stocks had cost C. Easman Jacobus $28,500.

The Public Service Corporation of New Jersey, a corporation engaged in the rendering of public utilities services in the said State, desired to acquire the said two bus lines, and negotiated with the said C. Easman Jacobus. A plan for the said acquisition, hereinafter outlined, was devised and executed.

The Public Service Coordinated Transport, a corporation affiliated with the said Public Service Corporation of New Jersey, caused to be organized, under the laws of the State of New Jersey, the C. Easman Jacobus, Inc., a corporation, and in pursuance of the plan transferred to the said corporation in exchange for all of its capital stock 2,500 shares 6 per cent cumulative preferred stock of the Public Service Corporation of New Jersey.

C. Easman Jacobus personally caused to be organized the petitioner corporation, the Bus and Transport Securities Corporation, and caused petitioner to issue to him and his nominees all of its capital stock in the

amount of 2,000 shares in exchange for all of the capital stock then issued and outstanding of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all in pursuance of the said plan.

Thereupon the Public Service Coordinated Transport Company, in pursuance of the said plan, transferred to petitioner all the said capital stock of C. Easman Jacobus, Inc., and petitioner transferred to the said Public Service Coordinated Transport Company all the said capital stocks of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all on March 29, 1929.

The fair market value of the said stock of the said C. Easman Jacobus, Inc., at the time acquired by petitioner in the said year 1929 was $274,062.50.

Petitioner filed its return for the said year 1929 at or about the due date thereof and included therein no computation of gain or loss on any transaction or transactions as hereinabove set forth. The Commissioner audited the said return, determined that petitioner had realized a gain of $245,562.50 in the acquisition of the capital stock of C. Easman Jacobus, Inc., in the manner hereinabove stated, and as a result thereof determined the deficiency of $27,011.88, as hereinabove appealed from.

SPECIFICATION OF ERRORS

(1) The Circuit Court of Appeals erred in holding that the exchange of property for stock above referred

to between the Public Service Coordinated Transport and the Bus and Transport Securities Corporation, this petitioner, was not a reorganization within the meaning of Sections 112(b) (4) and 112(i) (1) and 112(i) (2) of the Revenue Act of 1928.

(2) The Circuit Court of Appeals erred in holding and deciding that the petitioner received a taxable gain by reason of the exchange of its assets for all the capital stock of C. Easman Jacobus. That corporation in turn had as its sole asset shares of the Public Service Corporation of New Jersey which in turn was affiliated with and controlled the Public Service Coordinated Transport, the corporation to which the petitioner transferred its assets and from which it received such stock of C. Easman Jacobus, Inc.

(3) The Circuit Court of Appeals erred in affirming the judgment theretofore entered for the respondent, Commissioner of Internal Revenue, and erred in failing to reverse said judgment and in failing to direct the entry of an order reversing the said judgment.

(4) The Circuit Court of Appeals erred in affirming the deficiency in tax asserted by the Commissioner of Internal Revenue and in approving the order of the Board redetermining that deficiency.

SUMMARY OF ARGUMENT

The Statute here involved is a taxing act. Its language is to be construed in the ordinary sense of the

words involved and is to be construed most liberally on behalf of the taxpayer.

To conform with the statutory requirements laid down in Section 112, there must be an exchange, the thing exchanged by the transferor must be property. The transaction must be in pursuance of a plan of reorganization and the thing received must be stock or securities in another corporation which also is, under the definition contained in the statute, a party to the reorganization.

The transfer of the stock of the bus lines made by the petitioner for the stock of C. Easman Jacobus, Inc., was an exchange. The stock of the bus companies, which prior to the transfer was owned by the petitioner, was property. The transaction is established by the facts as being in pursuance of a plan, and the steps taken since they conform to the statutory requirements constituted a plan of reorganization. The Bus and Transport Securities Company, the petitioner here, and C. Easman Jacobus, Inc., were both under the definition contained in the statute, parties to the reorganization.

The statutory provisions relied upon to bring this case as it actually exists on the facts within the reorganization provision are Section 112(b) (4) and Section 112(i) (1) (A) and Section 112(i) (2).

Taking the facts as they are, the transaction on which the Commissioner asserts a tax against the petitioner was literally within the terms of the reorganization provisions of the statute and those provi-

sions exclude the transaction from immediate taxation. The petitioner, in addition to being literally within the statute, acquired through the preferred stock of Public Service Corporation of New Jersey, owned by C. Easman Jacobus, Inc., a continuing interest in the bus lines transferred to Public Service Coordinated Transport, the subsidiary of the Public Service Corporation of New Jersey.

If all intermediate entities are swept aside, if only the ultimate *personal* result is considered, the result is the same. If it were assumed that C. Easman Jacobus as a individual transferred the stock of the Bus Companies, originally owned by him, to Public Service Corporation of New Jersey, in exchange for preferred capital stock of that corporation, that transaction, had it occurred, would also have been within the reorganization provisions, namely Section 112(b) (3) and Section 112(i) (1) (A) and Section 112(i) (2).

Taking the facts as they are and looking at the ultimate results, C. Easman Jacobus, the individual, acquired a continuing interest in the bus lines transferred to the Public Service Corporation by reason of his ownership of the capital stock of the petitioner and through the petitioner his control of the capital stock of C. Easman Jacobus, Inc., and its ownership of the preferred capital stock of Public Service Corporation of New Jersey, and he acquired nothing else.

Thus viewed either as a reorganization fitting exactly into the terms and conditions of the statute or fitting into the test of continuing interest held by the

transferor, either corporate or individual, the transaction involved in this case is a reorganization as defined by the statute and that being true, no taxable gain was realized by the petitioner in connection therewith.

ARGUMENT

I.

The Statute Is a Taxing Act. Its Language Is to Be Construed in the Ordinary Sense of the Words Involved and It Is to Be Construed Most Liberally on Behalf of the Taxpayer.

Reduced to the simplest terms, the question in this case is whether the exchange by the petitioner of its property for all the capital stock of C. Easman Jacobus, Inc., resulted in taxable gain. The facts disclosed two preliminary steps which are not material to the determination of the case, but assist in the understanding of the third step around which the issue devolves. Briefly, the situation set forth by the facts is as follows:

One C. Easman Jacobus was in 1929 the owner of the capital stock of two bus lines which the Public Service Corporation of New Jersey desired to acquire. In 1929, a plan for that acquisition was devised and executed. Jacobus organized the petitioner corporation and exchanged for its stock all the capital stock of the bus lines which he then owned. A subsidiary of the Public Service Corporation of New Jersey organized a corporation, C. Easman Jacobus, Inc., and transferred to it 2500 shares, 6% cumulative pre-

ferred stock of the Public Service Corporation of New Jersey.

The petitioner then transferred to the subsidiary of the Public Service Corporation of New Jersey, the capital stock of the bus lines which it then owned and received in exchange therefor the capital stock of C. Easman Jacobus, Inc. It is this last transaction which the Commissioner of Internal Revenue asserts resulted in taxable gain and which the taxpayer petitioner claims was a non-taxable transaction squarely within the terms of Section 112(b) (4) as defined in Section 112(i) (1) and (2) of the Revenue Act of 1928.

The above transaction will be shown to be step by step within the literal words of every applicable provision of the statute. The statute is specific and concrete and when applied in the light of specific transactions, is perfectly clear and unambiguous. The words used are not only words of common meaning and understanding, but in most instances have received judicial construction. Words in taxing acts are to be read, where possible, in their ordinary meanings and where there is any doubt, words in a taxing act must be given that sense and that construction most favorable to the taxpayer, *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 561. The above case concerned the meaning of "interest". The Commissioner was undertaking to include as income in that case apportioned bond premiums derived from sales of bonds in

earlier taxable periods. This Court there said (page 561):

> "If there were doubt as to connotation of the term, and another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer."

Included in the citation of authority in support of the foregoing, was *United States* v. *Merriam*, 263 U. S. 179, 187-188. Upon this point this Court said:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153. The rule is stated by Lord Cairns in Partington v. Attorney-General, L. R. 4 H. L. 100, 122:
>
> "'I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax,

> cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'' And see Eidman v. Martinez, 184 U. S. 578, 583."

The foregoing rule was again applied in a most significant case in *Crooks* v. *Harrelson*, 282 U. S. 55.

The Circuit Court of Appeals for the Second Circuit in *Delaware and Hudson* v. *Commissioner*, 65 Fed. (2d) 292, 293-294, excellently stated the rule of construction which should be applied in dealing with our detailed taxing laws in general. It said:

> "A taxing system so detailed and particular as ours does not admit of the same flexibility of interpretation as one in more general terms. Perhaps its very refinement may defeat its purposes; elaboration often does. But the more articulate the expression, the less room remains for intendment beyond the words used. This is the penalty inherent in a progressive specification of any general meaning; what is left out is not to be supplied."

With the foregoing rules of construction in mind, the petitioner submits the pertinent provisions of Section 112(b) (4) and Section 112(i) of the Revenue Act of 1928 with interpolations of the names of the

several corporations showing how perfectly the transaction involved in this case fits within the literal terms of the statute. As so interpolated, Section 112(b) (4) reads as follows:

> "No gain or loss shall be recognized if a corporation"—*Bus and Transport Securities Corporation*—"a party to a reorganization exchanges property,"—*the capital stock of Butler-Newark Bus Line, Inc., and Boonton-Mt. Lakes Bus Lines, Inc.*—"in pursuance of the plan of reorganization, solely for stock or securities in another corporation"—*C. Easman Jacobus, Inc.*—"a party to the reorganization."

Pursuing the same interpolation, the transaction falls within the definition of a plan of reorganization as follows:

> (Section 112(i) (1). "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation"—*Bus and Transport Securities Corporation*—"of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation"—*C. Easman Jacobus, Inc.*

Further pursuing the above, the interpolation in Section 112(i) (2) is as follows:

> "The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation"—*Bus and*

Transport Securities Corporation—"of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation"—*C. Easman Jacobus, Inc.*

II.

The Transfer of the Stock of the Bus Lines for the Stock of C. Easman Jacobus, Inc., Was an Exchange.

Proceeding with the analysis of Section 112(b)(4), it will be noted that the Section is itself headed "(b) Exchanges solely in kind". We are to determine therefore whether the transfer of the stock of the bus lines for the stock of C. Easman Jacobus, Inc., was an exchange.

The Board of Tax Appeals states that the question presented "is whether the petitioner realized a taxable gain from the exchange of certain stock" (R. 7). In the pleadings (R. 3) and in the Board Findings (R. 8) the transaction is carefully described in terms of the steps taken without incorporating into the description any language which could be construed to be a conclusion, either of fact or law. The language used clearly discloses that an exchange occurred. That language (R. 8) is "Thereupon the Public Service Coordinated Transport in pursuance of the said plan transferred to petitioner all the said capital stock of C. Easman Jacobus, Inc., and petitioner transferred to the said Public Service Coordinated Transport all the said capital stocks * * *" of the Bus Lines.

The transaction is an exchange as defined by the

authorities. 23 C. J. 184 defines exchanges of property as follows:

> "An exchange of property is a mutual transfer of one or more pieces of property for property other than money."

A transaction involving the tax free exchange provision of the statute in the Revenue Act of 1921 has been applied by the Second Circuit. *Commissioner* v. *Greene*, 42 Fed. (2), 852.

The statutory provision construed in the above case was Section 202 of the Revenue Act of 1921 which, so far as material, reads as follows:

> "(c) For the purposes of this title, on an exchange of property, real, personal or mixed, for any other such property, no gain or loss shall be recognized * * * (1) When any such property held for investment, * * * is exchanged for property of a like kind or use;"

The taxpayer in that case exchanged stock which he held for bonds. In the course of the discussion, the Court said (page 853):

> "There was no money received by the respondents in the trust, only bonds, for the stock. The statute provides for nontaxable exchanges in which the property received has a 'readily realizable market value.' The parties to an exchange are fully justified in adopting the market value as a basis for the exchange and still remain within the contemplation of the statute. * * *

They truly exchanged these securities, as 'property held for investment.' "

III.

The Stock of the Bus Companies Given in Exchange Was "Property."

That capital stock of a corporation is property seems almost too elementary to require citation of authority. In *DeGanay* v. *Lederer*, 250 U. S. 376, the question was presented whether under the Income Tax Act of 1913, income derived from stocks and bonds physically situated in the United States was income from property therein. The Court defines such securities as property in the following language (pages 380-381):

> "A learned argument is made to the effect that the stock certificates, bonds and mortgages are not property, that they are but evidences of the ownership of interests which are property; that the property, in a legal sense, represented by the securities, would exist if the physical evidences thereof were destroyed. But we are of opinion that these refinements are not decisive of the congressional intent in using the term 'property' in this statute. Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them. To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages, and certificates of stock are regarded as property. * * *

"We have no doubt that the securities, herein involved, are property."

In *Burnet* v. *Brooks*, 288 U. S. 378, 391, the foregoing decision was cited and quoted with specific approval. Moreover, in *Commissioner* v. *Greene*, 42 Fed. (2) 852, both the stocks and the bonds involved in the exchange in that case were implicitly recognized as property and as property of the character and kind referred to in the statute.

IV.

The Transaction Was in Pursuance of a Plan of Reorganization.

The existence of a plan is established as a fact (Record 2-3, 7, 8-9), in virtually every paragraph of the agreed facts

"A plan for the said acquisition, hereinafter outlined, was devised and executed."

"—the C. Easman Jacobus, Inc., a corporaiton, and in pursuance of the plan transferred—"

"—all in pursuance of the said plan."

"—the Public Service Coordinated Transport Co. in pursuance of the said plan transferred to petitioner—".

The transaction being in pursuance of a plan as established by the facts pleaded, admitted and found by the Board, the question of law remaining is whether there was a "plan of reorganization" within the meaning of Section 112(b) (4). To determine that question, we must consider the definition of re-

organization as contained in Section 112(i) (1). In the parenthetical clause of that Section a "reorganization" is defined as "the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation." It is established as a fact (R. 3, 7, 8) that the Public Service Coordinated Transport in pursuance of the said plan transferred to petitioner all the capital stock of C. Easman Jacobus, Inc.

The language above quoted defining the specific transaction involved in this case is clear, unambiguous and requires no construction. The first clause within the parenthesis covers the exact transaction involved in this case. The plan therefore referred to in the facts was of necessity a plan of reorganization since it was a plan, which when carried out, represented a defined reorganization as specifically set out in the statute.

Pinellas Ice and Cold Storage Co. v. *Commissioner*, 287 U. S. 462, 469-470, interpreted this clause and defined a reorganization as something broader than a merger or consolidation and held that the clause included transactions of a character not ordinarily embraced within those terms. The definition of a reorganization as construed in that case attaches only one further condition, namely that

> "—to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to

ownership of its short-term purchase-money notes."

There is nothing mysterious in the words "plan of reorganization." The Circuit Court of Appeals in *Watts* v. *Commissioner*, 75 Fed. (2d) 981-982, disposed succinctly and definitely of what is meant by "a plan of reorganization", when it said:

> "The plan of reorganization was the contract made and performed."

V.

Bus and Transport Securities Corporation and C. Easman Jacobus, Inc., Were "Parties to a Reorganization."

As above indicated, it is important not only that there be an exchange, that property be exchanged, that such exchange of property shall be in pursuance of a plan of reorganization and that stock in another corporation shall be received, but it is essential that both the corporation receiving the stock and the corporation whose stock is so received shall be "parties to the reorganization." We turn, therefore, to Section 112(i) (2) for the definition of a "party to a reorganization" which includes specifically "both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation." Since Bus and Transport Securities Corporation received all the stock of C. Easman Jacobus, Inc. (R.

3, 7, 8) by reason of the transaction in issue, both corporations were parties to a reorganization within the meaning of the statute and all the terms of Section 112(b) (4) were, therefore, satisfied by the transaction as it was actually carried out.

Support is found for the above interpretation, if any is necessary, in the brief for the government in *Pinellas Ice and Cold Storage Co.* v. *Burnet* at page 22 where the government was drawing the important distinction between reorganizations involving the acquisition of property generally as distinguished from corporate stock and pointed out that under Section 203 (h) (2) of the 1926 Revenue Act (corresponding to Section 112(i) (2) of the 1928 Act) both corporations are parties to a reorganization where the stock of one is acquired by the other. In drawing that distinction, the government in that brief (page 22) said:

> "It will be noted that the definition specifically includes both parties in the case of one of the transactions mentioned in Section 203(h) (1) (A) but does not refer to the transaction which covers this case. Section 203(h) (1) (A), in the parenthetical clause, deals with two transactions, namely, (1) the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, and (2) the acquisition by one corporation of substantially all the properties of another. Section 203(h) (2) provides that in the case of the first transaction both corporations shall be deemed to be parties to the reorganization, but it

is silent as to whether both corporations in the second transaction are to be deemed parties to the reorganization."

The points of the definition are established. There was an exchange, the stock of the bus companies given in exchange was property, the transaction was in pursuance of a plan, the plan was a plan of reorganization, the party acquiring stock and the corporation whose stock was acquired were parties to a reorganization. No more complete, literal compliance with statutory language could be imagined.

VI.

The Petitioner Acquired a Continuing Interest in the Property Transferred.

Taking the facts as they are, the petitioner acquired literally within the terms within the statute, all of the capital stock of C. Easman Jacobus, Inc. and by so doing met all the requirements of a reorganization as set forth in the statute. Beyond and above meeting the literal terms of the statute, the petitioner in this transaction met also the further condition attached by this Court in *Pinellas Ice and Cold Storage Co.* v. *Commissioner*, 287 U. S. 462. That condition is not yet precisely defined but is expressed at the present time only in the most general terms "that the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of short-term purchase-money notes." Certainly the acquisition directly of capital stock of

the purchasing company would be such an interest and certainly also the acquisition of all the capital stock of a corporation, having as its sole asset capital stock of the purchasing company must be such an interest. Petitioner here did not acquire money, it did not acquire notes, it did not acquire securities in the general sense of the term, it did acquire through C. Easman Jacobus, Inc. preferred capital stock of the Public Service Corporation of New Jersey, the real purchaser of the bus company stocks and therefore through the stock of C. Easman Jacobus, Inc., so acquired by the petitioner it acquired an interest in the purchasing company. Its investment was still at the risk of the same general enterprise as had been its preceding interest in the stock of the two bus lines given in exchange. The only difference was that its first property was confined to two specific bus lines operating within a narrow radius in northern New Jersey. After the transaction was completed, the petitioner had an interest in all the varied transport and other activities of the Public Service Corporation of New Jersey, including the activities it had disposed of through the transfer of its bus companies' shares.

VII.

Viewed as a Transaction by B. Easman Jacobus, Individual, the Transfer Was Within Section 112 (b) (3) of the Revenue Act of 1928.

The opinion below (Record 15-18) places the decision of the Circuit Court of Appeals for the Third

Circuit upon the single ground that the transaction here was in effect one between C. Easman Jacobus as an individual and Public Service Coordinated Transport Co. and, had it been carried out in that form would have represented a taxable transaction. It is clear from the facts that the transaction was actually, when viewed in that light between C. Easman Jacobus as an individual and Public Service Corporation of New Jersey, which for operating reasons of its own, selected Public Service Coordinated Transport as the medium for the exchange. Viewed as a transaction between the individual C. Easman Jacobus and Public Service Corporation of New Jersey and ignoring intermediate entities, this transaction, had its consummation been in that form, would have fallen clearly within the terms of Section 112(b) (3) of the Revenue Act of 1928 and no tax liability would have attached.

Interpolating in Section 112(b) (3) for this imagined transaction in the same manner as has been interpolated in the actual transaction in pages 13-14 of this Brief, Section 112(b) (3) reads as follows:

> "(3) Stock for Stock on Reorganization—No gain or loss shall be recognized if stock or securities in a corporation" (*the bus company stocks*) "a party to a reorganization" (*the bus companies*) "are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation" (*Public Service Corporation of New Jersey*) "a party to the reorganization."

The definition of a reorganization as contained in Section 112(i) (1) interpolated under these assumed facts is as follows:

> "(i) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation" (*Public Service Corporation of New Jersey*) "of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation," (*the bus companies*).

Interpolating further in Section 112(i) (2) the assumed transaction meets the test of "a party to the reorganization."

> "(2) The term 'a party to a reorganization' includes * * * both corporations in the case of an acquisition by one corporation" (*Public Service Corporation of New Jersey*) "of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation" (*all the stocks of the bus companies*).

The fears of the Circuit Court that all taxation of gains are at an end if the decision favors the petitioner in this case are wholly groundless. The continuing interest test imposed by this Court in *Pinellas Ice and Cold Storage* v. *Commissioner*, 287 U. S. 462, is a complete bar to any such possibility. If the stock held by C. Easman Jacobus, Inc. had been other than stock of Public Service Corporation of New Jer-

sey, the purchaser, the requirement of a continuing interest would not have been met and the transaction would have been taxable. It would not be possible to accomplish a reorganization of the type here involved by supplying the corporation all of the stock of which is acquired with either cash or a miscellaneous group of investments foreign to the corporation acquiring the assets of the seller. But when the stock acquired in the exchange represents an interest in the purchaser in the form of capital stock, directly or indirectly, the transaction is a reorganization, whether viewed in its technical aspects or whether, stripped of all machinery, it is viewed with reference to the thing actually done.

It is important to bear in mind that the transaction involved here was at arms length between strangers. The Public Service Corporation took over the bus operations previously conducted by Jacobus, and made him in effect a stockholder in its enterprises. That was precisely the kind of transaction intended to be treated as not subject to computation of gain or loss under Section 112 of the Act of 1928. The steps taken while seemingly involved, were not taken to cover a cash sale, but were taken with a view to bringing a transaction, which conformed to the statutory intent, clearly within the machinery outlined in the statute and which had to be followed if the statutory plan was to be complied with. If the thing done is not of the character intended to be covered by the statute, it may well be said that mere mechanical compliance

is not enough, but where the mechanical form is prescribed in the statute and the thing done is the thing contemplated by the statute, the fact of mechanical compliance should not be used as an argument to the effect that the mechanical plan adopted, being involved, was therefore a scheme of evasion or avoidance.

Both in the thing undertaken to be done and in the mechanical forms by which it was consummated, the transaction here was a reorganization and under the terms of the statute no present tax liability attached.

It is important finally to point out that Section 112 does not provide for an exemption from tax but is to be read in connection with Section 113 of the Act as a complete plan for fixing the time when taxes are to attach to capital transactions.

Under Section 113(a) (6) this petitioner took the stock of C. Easman Jacobus, Inc. on the basis of the cost to Jacobus individually, of the bus companies' stocks. When subsequent transactions occur in the stock of C. Easman Jacobus, Inc. this means that the petitioner must adopt a computation of gain based upon a cost of $28,500 (Record 2). Any transaction which Jacobus may have individually in the stock of this petitioner or any realizations by way of dissolution of the petitioner, result in a computation for income tax purposes on a basis of cost to Jacobus of the same $28,500. It was the purpose of the taxing act to defer taxes in reorganizations and to impose taxes only at times of ultimate realization. With the policy of that statute, this Court has no concern. Its

duty is to interpret and apply the statute as Congress wrote it.

CONCLUSION

Petitioner respectfully submits that this Court should decide and hold that the transaction upon which the Commissioner is attempting to assert a tax is one within the intent and the terms of Section 112 of the Revenue Act of 1928, that no tax liability attaches thereto, that therefore the case should be remanded to the Circuit Court reversing the judgment of that Court and directing that a mandate issue to the Board of Tax Appeals to enter an order of no deficiency.

Respectfully submitted,

ALBERT E. JAMES,
Attorney for the Petitioner.

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CHARLES ELMORE

No. 490

In the Supreme Court of the United States

OCTOBER TERM, 1935

BUS AND TRANSPORT SECURITIES CORPORATION,
PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 7) is not officially reported. The opinion of the Circuit Court of Appeals (R. 15) is not officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 3, 1935 (R. 18–19). The peti-

tion for certiorari was filed on October 3, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Corporation A wished to acquire all the stock in two bus lines, and the following plan was devised for that purpose. The individual who owned all the stock created corporation X, the taxpayer, and transferred to it all of the stock of the two bus lines in exchange for all the stock of X. On the other hand corporation A was affiliated with corporation B, which created corporation C and transferred to it certain stock of corporation A in exchange for all the stock of C. Thereupon corporation X, the taxpayer, transferred the stock in the bus lines to corporation B in exchange for all the stock of corporation C. It does not appear that corporation X, the taxpayer, and corporation C performed any other function or served any business purpose after the transfer was effected. The question presented is:

Whether corporation X, the taxpayer, is relieved from taxation on the gain realized from the transaction within the meaning of Section 112 (b) (4) and (i) of the Revenue Act of 1928. This depends upon (1) whether the taxpayer corporation X retained some interest in the two bus lines which were transferred to corporation B, and (2) whether the taxpayer, corporation X, and corporation C

were created for useful business purposes or were mere devices to bring the case under the reorganization provisions of the Revenue Act under the rule laid down by this Court in *Gregory* v. *Helvering,* 293 U. S. 465.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791, 816:

> SEC. 112. RECOGNITION OF GAIN OR LOSS.
>
> (a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.
>
> (b) *Exchanges solely in kind.*—
>
> * * * * *
>
> (4) * * * No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.
>
> * * * * *
>
> (i) *Definition of reorganiation.*—As used in this section and sections 113 and 115—
>
> (1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by

a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

* * * * *

STATEMENT

The facts as found by the Board of Tax Appeals, which consisted of allegations in the petition admitted by the respondent's answer, may be summarized as follows (R. 7–9):

The Public Service Corporation of New Jersey (hereafter called Public Service Company), desired to acquire two bus lines, the Butler-Newark Bus Line, Inc. (hereafter called BN Company) and the Boonton-Mt. Lakes-Newark Bus Lines, Inc. (hereafter called BM Company). One C. Easman Jacobus was the owner of practically all the stock of the two lines, which he had acquired for $28,500. The transfer was accomplished in the following manner, pursuant to plan:

The Public Service Coordinated Transport (hereafter called Coordinated Company) organized the C. Easman Jacobus, Inc. corporation (hereafter called Jacobus Company), and transferred to it in exchange for all of its capital stock 2,500 shares of 6% Cumulative Preferred Stock of the Public Service Company.

C. Easman Jacobus personally organized the Bus and Transport Securities Corporation, the taxpayer, and caused it to issue to him and his nominees all of its capital stock in exchange for all of the capital stock of the BN and BM Companies.

Thereupon, on March 29, 1929, the Coordinated Company transferred to the taxpayer all the capital stock of the Jacobus Company and the taxpayer transferred to the Coordinated Company all the stock of BM and BN Companies. At the time of the transfer, the fair market value of the stock of the Jacobus Company was $274,062.50 (R. 7–9).

The taxpayer filed its return for the year 1929 and reported no gain or loss on the above-mentioned transaction. The Commissioner audited the return and determined that the taxpayer had realized a gain of $245,562.50, as a result of which there was a deficiency of $27,011.88. The taxpayer appealed to the Board of Tax Appeals on the ground that the transaction fell within the provisions of Section 112 (b) (4) and (i) under which no gain or loss was recognized. The Board of Tax Appeals decided in favor of the Commissioner on

the ground that there was no reorganization within the meaning of the statute. The taxpayer appealed to the Circuit Court of Appeals which affirmed the decision of the Board of Tax Appeals.

ARGUMENT

The first reason which the taxpayer assigns for granting the writ is that the decision in this case is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Minnesota Tea Co.* v. *Commissioner,* 76 F. (2d) 797. This Court granted certiorari in that case, No. 174, October Term, 1935, on October 14, 1935.

In the instant case, however, there was no such continuity of interest in the property transferred as there was in the *Minnesota Tea Co.* case. In the latter case the Minnesota Tea Company transferred certain assets to the Grand Union Company in exchange for cash and Grand Union stock, and the Minnesota Tea Company continued to hold the Grand Union stock. In the instant case, however, the taxpayer retained no interest in the property transferred, the stock of the two bus lines, BN Company and BM Company. After the transfer the taxpayer held all the stock of the Jacobus Company, which had no proprietary interest in the bus lines, BN Company and BM Company. Therefore, the instant case does not come within the reorganization provision of the revenue act. *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462; *Cortland Spe-*

cialty Co. v. *Commissioner,* 60 F. (2d) 937 (C. C. A. 2d).

The taxpayer argues that there was such a continuity of interest as the statute requires because the assets of Jacobus Company consisted of 2,500 shares of preferred stock of the Public Service Company, and the Public Service Company was affiliated with the Coordinated Company, which in turn was the owner of all the stock of the BN Company and the BM Company. We submit that this relationship between the taxpayer and the BN and BM companies, after the transfer, was far too remote to come within the rule laid down by the *Pinellas* case and the *Cortland Specialty Co.* case.

Moreover, the entire transaction, including the creation of the petitioner and the Jacobus Company, was a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character. There was no purpose to reorganize a business, but merely to transfer some stock. Therefore the case comes within the rule laid down by this Court in *Gregory* v. *Helvering,* 293 U. S. 465. In that case this Court said (p. 470):

> The whole undertaking, though conducted according to the terms of subdivision (B), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. * * * To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.

CONCLUSION

The instant case is not in conflict with the decision in the *Minnesota Tea Co.* case because there is a material difference in the facts of the two cases. This case is controlled by prior decisions of this Court, and does not present any new question of general importance. Therefore, the petition for certiorari should be denied.

Respectfully submitted.

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OCTOBER 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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CHARLES ELMORE

No. 490

In the Supreme Court of the United States

OCTOBER TERM, 1935

BUS AND TRANSPORT SECURITIES CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 490

BUS AND TRANSPORT SECURITIES CORPORATION, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 7–11) is not officially reported. The opinion of the Circuit Court of Appeals (R. 15–18) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 3, 1935. (R. 18–19.) The petition for certiorari was filed October 3, 1935,

and granted November 11, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Corporation A wished to acquire all the stock in two bus lines, and the following plan was devised for that purpose. The individual who owned all the stock created corporation X, the taxpayer, and transferred to it all of the stock of the two bus lines in exchange for all the stock of X. On the other hand corporation A was affiliated with corporation B, which created corporation C and transferred to it certain preferred stock of corporation A in exchange for all the stock of C. Thereupon corporation X, the taxpayer, transferred the stock in the bus lines to corporation B in exchange for all the stock of corporation C. It does not appear that corporation X, the taxpayer, and corporation C performed any other function or served any business purpose after the transfer was effected. The questions presented are:

1. Whether under Section 112 (b) (4) and (i) of the Revenue Act of 1928 the continuity of interest required in connection with statutory reorganizations did not make it necessary that corporation X, the taxpayer, receive stock of B, rather than of C.

2. Whether the definition of the term "reorganization" contained in clause (A) of Section 112 (i)

(1), Revenue Act of 1928, should be limited to transactions which partake of the nature of mergers or consolidations.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved will be found in the Appendix, *infra*, pp. 17–19.

STATEMENT

The facts as found by the Board of Tax Appeals, which consisted of allegations in the petition admitted by the respondent's answer, may be summarized as follows (R. 8–9):

The Public Service Corporation of New Jersey (hereinafter called Public Service Company) desired to acquire two bus lines, the Butler-Newark Bus Line, Inc. (hereinafter called BN Company) and the Boonton-Mt. Lakes-Newark Bus Lines, Inc. (hereinafter called BM Company). One C. Easman Jacobus was the owner of practically all the stock of the two lines, which he had acquired for $28,500. The transfer was accomplished in the following manner, pursuant to plan:

The Public Service Coordinated Transport Company (hereinafter called Coordinated Company) organized C. Easman Jacobus, Inc., a corporation (hereinafter called Jacobus Company), and transferred to it in exchange for all of its capital stock 2,500 shares of 6% Cumulative Preferred Stock of the Public Service Company.

C. Easman Jacobus personally organized the Bus and Transport Securities Corporation, the taxpayer, and caused it to issue to him and his nominees all of its capital stock in exchange for all of the capital stock of the BN and BM Companies. Thereupon, on March 29, 1929, the Coordinated Company transferred to the taxpayer all the capital stock of the Jacobus Company and the taxpayer transferred to the Coordinated Company all the stock of BM and BN Companies. (R. 8.) At the time of the transfer, the fair market value of the stock of the Jacobus Company was $274,062.50. (R. 9.)

The taxpayer filed its return for the year 1929 and reported no gain or loss on the above-mentioned transaction. The Commissioner audited the return and determined that the taxpayer had realized a gain of $245,562.50, as a result of which there was a deficiency of $27,011.88. (R. 9.) The taxpayer appealed to the Board of Tax Appeals on the ground that the transaction fell within the provisions of Section 112 (b) (4) and (i) under which no gain or loss was recognized. The Board of Tax Appeals decided in favor of the Commissioner on the ground that there was no reorganization within the meaning of the statute. The taxpayer appealed to the Circuit Court of Appeals, which affirmed the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

The transfer of petitioner's assets to the Coordinated Company in exchange for stock of the Jacobus Company is not within the literal language of the statute because petitioner retained no interest in the company to which its assets were transferred. It is settled that in such a case the transferor must retain an intimate interest in the affairs of the transferee, and to satisfy this requirement it would have been necessary for petitioner to receive stock of the Coordinated Company. The fact that the Jacobus Company held stock of the Public Service Company, which was affiliated with the Coordinated Company, does not satisfy the statute, for petitioner had no voice in the management of the company which acquired its assets, and its proprietary interest in those assets had completely disappeared. Since its only interest must be traced through the stock of the Public Service Company, and this was preferred stock rather than common stock, the question arises whether it can be treated as representing a similar interest to that which petitioner held before. Upon this point reference is made to the brief for respondent in *John A. Nelson Company* v. *Guy T. Helvering, Commissioner of Internal Revenue,* No. 61, present term.

II

Moreover, we contend that the literal application of the statute is not permissible and that the definition of the term "reorganization" should be limited to transactions which partake of the nature of mergers or consolidations. Upon this point reference is made to the brief for the petitioner in *Guy T. Helvering, Commissioner of Internal Revenue* v. *Minnesota Tea Company,* No. 174, present term. We think that the transaction here involved does not partake of the nature of a merger or consolidation and is not within the purview of the statute. There was no plan relating to a change in the form of a business, but merely a plan to exchange certain assets. This Court has already held that the casting of such a transaction in the guise of a reorganization does not satisfy the statute.

ARGUMENT

I

WHERE ONE CORPORATION TRANSFERS ITS ASSETS TO ANOTHER, THE REQUIRED CONTINUITY OF INTEREST IS NOT SATISFIED UNLESS STOCK OF THE TRANSFEREE IS ACQUIRED IN EXCHANGE

The general rule of the statute is that the gain upon an exchange is taxable. To this there are certain well-defined exceptions. The petitioner contends that the transaction here involved is literally within the scope of one of the exceptions, namely,

Section 112 (b) (4) of the Revenue Act of 1928, which provides as follows:

> No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

Petitioner transferred its assets to another corporation in exchange for certain assets of the latter, but we submit that the assets received did not constitute stock or securities in another corporation a party to the reorganization, and hence that even the literal language of the statute is not applicable here.

Petitioner's assets consisted of all of the capital stock then issued and outstanding of bus line companies (the BN and BM companies). It transferred those assets to the Coordinated Company and received in exchange all of the capital stock of the Jacobus Company. (R. 8.) The only actual participants in the exchange were petitioner and the Coordinated Company. The latter acquired the stock of the bus lines, but petitioner acquired none of the transferee's stock. This Court has definitely held in *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462, that when a corporation transfers its assets to another corporation in a transaction which is accepted as a statutory reorganization, the transferor must retain an intimate interest in the affairs of the

transferee. In that case one corporation transferred its assets to another corporation in exchange for cash and four promissory notes secured by bonds of the transferee company. This Court held that the transaction did not constitute a statutory reorganization, and said (p. 470):

> Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes.

By the transaction in the instant case petitioner parted with its assets and acquired no interest whatsoever in the affairs of the transferee. Instead of acquiring stock of the transferee, petitioner acquired stock of a separate corporation, and we submit that petitioner did not retain the continuity of interest which the statute requires. This transaction merely represents an exchange of investments and has no relation to a change in the form of a business. Petitioner acquired the Jacobus securities and the Coordinated Company acquired the bus line securities. It is difficult to believe that Congress thought that a transfer of its holdings by each corporation to the other would serve any business purpose which should be encouraged by making the transaction tax free. The statute was designed to aid the reorganization of a business, and while the making of investments may be a business, an exchange of investments is not a reorganization of a business.

Petitioner contends that the requisite continuity of interest is preserved because the Jacobus Company, whose stock petitioner acquired, held 2,500 shares of 6% cumulative preferred stock of the Public Service Corporation of New Jersey, and the latter company was affiliated with the Coordinated Company, which acquired petitioner's former assets. We think this contention is untenable because the statute requires that the consideration for a transfer of assets shall be "stock or securities in another corporation a party to the reorganization," and the Jacobus Company was not a party to the exchange, nor a party to a reorganization. The purpose of this requirement, of course, is to limit the application of the statute to those formal changes which Congress had in mind in adopting the tax-free reorganization provisions and to confine the statute to cases where the old proprietors are employing the old assets in a new corporate form. If the assets go to one corporation and the taxpayer holds a proprietary interest in a different corporation, we think the taxpayer has severed his interest in the assets transferred.

After the transaction here in question the petitioner's assets were in the possession of the Coordinated Company and petitioner held stock in the Jacobus Company, which in turn held stock in the Public Service Company, which in turn was affiliated with the Coordinated Company. We think it is fanciful to suggest that such an at-

tenuated relationship represents a continuity of interest within the meaning of the statute, and we submit that the petitioner is further removed from its former assets than was the taxpayer in the *Pinellas* case, who held notes secured by bonds of the corporation holding the transferred assets. The definition in clause (B) of Section 112 (i) (1) is specific that the taxpayer must control "the corporation to which the assets are transferred", and we think that a relationship similar in kind is implicit in the clause (A) definition, although it does not indicate any required degree of interest.

The petitioner had no interest which gave it any voice in the management of the corporation holding its former assets and its proprietary interest in those assets had disappeared completely. We submit that this cannot be regarded as merely a formal change in position, and consequently that the transaction is not within the purview of the statute. We think that to satisfy even the literal language of the statute it would have been necessary for the petitioner to acquire stock of the Coordinated Company which held its former assets.

Moreover, since the Public Service Company stock held by the Jacobus Company was preferred and not common, and the record does not show it carried any voting rights, the question arises whether it can be treated as representing a similar proprietary interest to that which petitioner held in its former assets. Accordingly, we refer at this

point to the brief for respondent in *John A. Nelson Company* v. *Guy T. Helvering, Commissioner of Internal Revenue,* No. 61, present term.

II

THE TRANSACTION DID NOT PARTAKE OF THE NATURE OF A MERGER OR CONSOLIDATION

If it be held that the consideration petitioner received for its assets is properly regarded as a continuity of interest within the meaning of the statute, we then reach the question whether it is admissible to apply literally the definition of the term "reorganization" found in clause (A) of Section 112 (i), or whether it is to be limited to transactions which partake of the nature of mergers or consolidations. This question is presented in *Guy T. Helvering, Commissioner of Internal Revenue* v. *Minnesota Tea Company,* No. 174, present term, and is fully considered in the brief for petitioner in that case. Accordingly, we respectfully refer to Point I of the Argument in that case and incorporate it here by reference.

We submit that the transfer of petitioner's assets to the Coordinated Company in consideration of stock of the Jacobus Company is not within the purview of the statutory requirement for the following reasons:

1. The only plan referred to in the findings is the plan of the Public Service Company to acquire the stock of the bus lines which petitioner trans-

ferred in the transaction under examination. (R. 8.) The record contains no written agreement, no statement of verbal negotiations, no resolutions adopted by either corporation, and no instruments evidencing the transfer. The plan is therefore shown only by what was accomplished. The bus line stocks were owned by an individual, C. Easman Jacobus. He created the petitioner corporation and transferred the bus line stocks to the petitioner in exchange for the latter's stock. This was a tax-free transfer so far as C. Easman Jacobus was concerned. Section 112 (b) (5), Revenue Act of 1928. The direct transfer of stock by an individual would, of course, not be a reorganization, so that there would have been no basis for invoking the benefit of the reorganization provisions without a corporation to make the transfer. The Coordinated Company (an affiliate of the Public Service Company) caused a corporation to be organized to receive the assets from petitioner. This corporation took the name C. Easman Jacobus, Inc. and issued all its capital stock to the Coordinated Company in exchange for 2,500 shares of preferred stock of the Public Service Company. With these arrangements completed, petitioner transferred its assets to the Coordinated Company and received in exchange the stock of the Jacobus Company. These transactions occurred on the same day (March 29, 1929). (R. 8.) Thus the result is that the bus lines formerly owned by C. Easman Jacobus individually are now owned by the Coordi-

nated Company, while C. Easman Jacobus, the individual, is the stockholder of petitioner, and petitioner in turn is the sole stockholder of the Jacobus Company, and the latter in turn holds 2,500 shares of the Public Service Company's stock. Putting aside, as we must, the motive of tax avoidance, we submit that the record shows a plan having no relation to the business of either corporation participating in the transfer but a mere exchange of investments. There was no combination of business activities under a central management, but like the transaction in *Gregory* v. *Helvering,* 293 U. S. 465, 469, "a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner."

2. After the transaction petitioner and the Coordinated Company existed at the same time, pursuing their separate activities. The petitioner remained in existence, its corporate form was not changed, its business did not pass into other hands, its stockholders did not change, nor did they acquire stock in the corporation which acquired petitioner's former assets. Petitioner's liabilities were not assumed by the Coordinated Company and the latter did not succeed to any corporate rights or privileges of the petitioner. As pointed out in the *Minnesota Tea Company* brief, these elements are

ordinarily present in mergers or consolidations, and it is significant that they are entirely wanting here.

Petitioner also contends that the transaction is a reorganization within the literal language of another portion of the definition in clause (A): "* * * the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation". Petitioner says that it acquired all the stock of the Jacobus Company and that the transaction was therefore literally within the quoted definition. However, since the only relief provision available to petitioner is Section 112 (b) (4), and it is predicated upon a transfer of assets, it is quite apparent that if the quoted definition is availed of by petitioner, it must be read as dealing with an acquisition of stock in exchange for assets. However, there are two other portions of the definition which specifically deal with transfers of assets,[1] and we submit that the definition quoted above must be

---

[1] Section 112 (i) (1) (A):

> * * * the acquisition by one corporation of * * * substantially all the properties of another corporation * * *.

Section 112 (i) (1) (B):

> a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred * * *.

limited to other fields. This definition is thoroughly discussed in the brief for the petitioner in *Guy T. Helvering, Commissioner of Internal Revenue* v. *Watts,* Nos. 184–186, present term, to which we respectfully refer the Court.

The need for this limitation is the more apparent when it is considered that although the definition in clause (B) dealing with a transfer of assets requires an 80% control of the transferee,[2] the portion of the definition here sought to be applied requires only a majority stock control. Petitioner's contention would therefore result in the anomalous situation of having two applicable definitions with conflicting requirements. Since two definitions deal specifically with transfers of assets, the ordinary rules of construction would seem to require that a specific provision must prevail over a more general provision. *Hellmich* v. *Hellman,* 276 U. S. 233. Applying that principle here, we submit that petitioner's application of the definition above quoted is clearly inadmissible.

CONCLUSION

In view of the foregoing, we submit that the decision below should be affirmed, either upon the ground that petitioner failed to acquire stock of the company to which it transferred its assets, and thus the literal language of the statute is inap-

[2] "Control" is defined in subdivision (j) of Section 112 as the ownership of "at least 80 per centum of the total number of shares of all other classes of stock of the corporation."

plicable, or because, in any event, it is not consistent with the purpose of Congress to apply the definition to transactions which do not partake of the nature of a merger or consolidation.

Respectfully submitted.

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NOVEMBER 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 816:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * *

(4) * * * No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * *

(i) *Definition of reorganization.* — As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere

change in identity, form, or place or organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

* * * * *

(j) *Definition of control.*—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 577. *Definitions.*—The term "reorganization," as used in sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in sections 112 and 113 includes a cor-

poration resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation, within the meaning of section 112, when owning—

(1) At least 80 per cent of the voting stock, and

(2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of article 574 are complied with if "stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

U. S. GOVERNMENT PRINTING OFFICE: 1938

SUPREME COURT OF THE UNITED STATES.

No. 490.—October Term, 1935.

Bus and Transport Securities Corporation, Petitioner,
vs.
Guy T. Helvering, Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 16, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner—Bus and Transport Securities Corporation—challenges a deficiency income tax assessment for 1929, and says that the transaction from which the alleged taxable gain arose was reorganization within Sec. 112, Rev. Act, 1928. Paragraphs (b) (4), (i) (1) and (i) (2) are specially relied upon.*

Jacobus owned practically all shares of two corporations, herein designated "A" and "B", which operated bus lines. The Public Service Corporation of New Jersey—the projector—desired to control these lines; and to that end engineered the following plan.

Public Service Coordinated Transport Company, affiliated with the projector, caused the organization of C. Easman Jacobus, Inc., took all the stock and paid therefor by transfering 2500 of the projector's shares.

Jacobus caused petitioner to be organized and acquired all its stock in exchange for all shares of "A" and "B" corporations. Thereafter petitioner transferred to Public Service Coordinated Transport Company these "A" and "B" shares and took all shares of C. Easman Jacobus, Inc.

Thus, petitioner, through Jacobus, Inc., came to control 2500 of the projector's shares. And Public Service Coordinated and Transport Company became owner of all shares of "A" and "B" corporations. Through these manipulations, the projector obtained indirect control of corporations "A" and "B" and the lines which they operate.

*Margin of opinion in No. 174.

The Commissioner, the Board of Tax Appeals, and the Circuit Court of Appeals all rightly concluded that petitioner was not party to a reorganization within the statute. Certain corporate shares owned by it were exchanged for shares which another corporation owned. Neither party to the exchange acquired any definite immediate interest in the other. Nothing here, we think, even remotely resembles either merger or reorganization as commonly understood. *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462.

The challenged judgment must be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.